

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

FUNCTION MEDIA, L.L.C.

Plaintiff,

vs.

GOOGLE INC. AND YAHOO!, INC.

Defendants.

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Civil Action No. 2007-CV-279

JURY TRIAL DEMANDED

**PLAINTIFF'S RESPONSE TO GOOGLE'S MOTION IN *LIMINE*
NO. NINE: MOTION TO PRECLUDE ARGUMENT THAT GOOGLE HINDERED
FUNCTION MEDIA OR ITS EXPERT FROM TESTING OR
ANALYZING THE ACCUSED PRODUCTS**

Google's ninth motion in limine seeks to preclude argument that Google hindered Function Media or its experts from testing or analyzing the Accused Products. Function Media agrees that it will not affirmatively complain that Google withheld sufficient access to the Accused Products or otherwise hindered Function Media's ability to test the products—with one caveat. If Google opens the door by asserting, for example, that Function Media did not test various functionalities of the Accused Products or did not utilize more than one website and/or a website "owned by other than the Seller," *see, e.g.*, '025 Patent Claim 1, Function Media obviously should be permitted to rebut as unfounded any such allegation on the basis of the parties' agreement to limit the testing. Just as Function Media should not be permitted to use the parties' agreement against Google, Google should not be permitted to use the parties' agreement against Function Media.

Respectfully submitted,

/s/ Joseph S. Grinstein

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2009, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, using the electronic filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

/s/ Jeremy J. Brandon

Jeremy J. Brandon